No. 05-1272

IN THE

# Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. and BOEING NORTH AMERICAN, INC.,

*Petitioners,*

v.

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA *ex rel.* JAMES S. STONE,

*Respondents.*

On a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

## BRIEF OF *AMICI CURIAE* PATRICIA HAIGHT AND IN DEFENSE OF ANIMALS IN SUPPORT OF RESPONDENTS


JEREMY L. FRIEDMAN
*Counsel of Record*
2801 Sylhowe Road
Oakland, CA 94602
(510) 530-9060

KAREN L. LUGOSI
11811 North Tatum Blvd.
Suite 4020
Phoenix, AZ 85028
(602) 222-4160

Counsel for *Amici Curiae*
Haight and In Defense of Animals


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## INTEREST OF *AMICI CURIAE*[1]

Patricia Haight and In Defense of Animals are *qui tam* relators in a False Claims Act (FCA) case entitled *United States ex rel. Haight v. Catholic Healthcare West*, which was decided in the Ninth Circuit and reported at 445 F.3d 1147. Currently, defendants in the *Haight* action have pending a petition for a writ of certiorari (Case No. 06-282), and *qui tam* relators have filed a conditional cross petition (Case No. 06-473). Although the "original source" question was not reached in *Haight*, nor presented in the pending cross petitions, *Haight* involves application of the statutory bar against parasitic *qui tam* actions embodied in 31 U.S.C. §3730(e)(4). *Amici curiae* Haight and In Defense of Animals therefore have a strong interest in assisting the Court in its interpretation and application of the statutory bar against parasitic actions.

Dr. Haight served as Southwest Regional Director at In Defense of Animals, an animal welfare advocacy organization. In their *qui tam* action filed under §3730(b), relators in *Haight* allege that scientists at a private research institution submitted a false and fraudulent grant application to the National Institutes of Health (NIH) in order to secure federal funds. Dr. Haight did not work for defendants, but she discovered the falsity of the defendants' representations to NIH through her own, independent investigatory efforts.

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[1]All parties have consented to the filing of this brief. Petitioner's general consent is on file, and letters of consent from the Solicitor General and *qui tam* relator have been lodged with the Court. *Amici curiae* represent that their own counsel wrote this brief and that no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

In the district court and in the Ninth Circuit, defendants in *Haight* contended that the statutory bar of parasitic *qui tam* actions, §3730(e)(4), applied; and that relators could not qualify as original sources unless they were "true insiders" who had seen the entirety of the fraud with their own eyes. Relators responded that there is no statutory requirement that an original source be an "insider," arguing that criteria for the exception to the statutory bar are met when the relator makes a meaningful contribution to the discovery of the fraud through her own direct and independent investigatory efforts. Because the Ninth Circuit found that there was no public disclosure triggering the statutory bar, it did not need to reach the original source issue.

Dr. Haight and In Defense of Animals file this *amici curiae* brief in support of respondents in this case to urge the Court to interpret the original source doctrine consistent with the clear statutory purpose of §3730(e)(4). That purpose is to bar parasitic *qui tam* actions – when the relator bases the allegations upon the investigatory coattails of the government's investigation. The "original source" exception was incorporated into the 1986 Amendments for the purpose of avoiding improper application of the statutory bar, in direct response to the case of *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). *Amici* maintain that original source status is shown when the relator contributes to the discovery of the fraud through his own direct and independent investigatory efforts.

*Amici* also maintain that once the Attorney General intervenes in the action, as occurred in *Rockwell*, the statutory bar no longer applies. Indeed, the government intervention exception is on equal statutory footing in §3730(e)(4)(A) with the original source exception. After intervention, disputes over the relator's contribution to the discovery of the fraud are addressed in the bounty provisions of §3730(d)(1).

## STATUTORY PROVISION INVOLVED

31 U.S.C. §3730(e)(4):

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

## ARGUMENT

### 1. The Original Source Provision is an Exception to the Statutory Bar of Parasitic *Qui Tam* Actions, it is Not a Free-Standing Requirement that Relators be "Insiders" and "Whistleblowers" With Prior Knowledge of the Fraud.

Rockwell International and *amici curiae* supporting petitioner ask this Court to interpret the statutory bar in §3730(e)(4) to require all relators under the FCA to be "insiders" and "true whistleblowers" with full knowledge of the details of the fraud prior to their disclosures to the government. These contentions have no textual basis, are greatly misguided, and lie at the base of much confusion in the federal courts.

*Amici* here instead suggest the Court interpret the "original source" provision consistent with clear congressional purposes: first, to prohibit only parasitic *qui tam* actions; and second, to create an exception when the relator is an original source of information to the government.

As gleaned from the history of the False Claims Act and its amendments, the "public disclosure" provision was drawn as a narrow bar of parasitic lawsuits, where the relator derives knowledge of the fraud as a result of the government's (or news media's) investigation. These were the precise elements of *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). It is also clear that the "original source" exception was an express response to the circumstances in *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984).

Known originally as "Lincoln's Law," the FCA was passed during the Civil War to help recover government funds lost through fraud and waste. In its initial form, it contained *qui tam* provisions authorizing private persons to enforce the statute's proscriptions, without limitation as to who could serve as relator. In 1943, the Supreme Court permitted recovery by a *qui tam* relator who merely filed a civil FCA action based upon a copy of a criminal indictment that had already been filed by the government. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). Seen as an example of a parasitic lawsuit – one where the relator bases the *qui tam* action on the government's own investigatory labor – Congress that year acted to correct the problem in *Hess* with an express statutory bar.

Congress added the FCA's first version, formerly codified at 31 U.S.C. §232(C), precluding actions that were "based on evidence or information in possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."

Courts interpreted the 1943 bar to apply only when

> the evidence and information in possession of the United States ... was sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute. *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 674 (9th Cir. 1978).

The problem with the 1943 version of the bar was that it went too far, foreclosing operation of the important *qui tam* enforcement provisions whenever the government possessed knowledge of the fraud. Even when the government had such information, officials might determine for lack of resources or political will not to seek remedies. Moreover, in applying the 1943 law, courts relied upon the "government knowledge" bar to dismiss actions even when it was clear the relator was not a "parasite" – for example when the government had gained information relating to alleged false claims as a result of the disclosures of the relator.

In the seminal case of *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984), the Seventh Circuit reviewed the legislative history of the 1943 amendments in detail, rejecting the state relator's request for an exemption from the "government knowledge" bar. Wisconsin had already investigated and convicted the defendant of Medicaid fraud, and pursuant to regulations had reported information supporting the fraud to the federal government. The court noted that, while a draft of the senate bill for the 1943 amendment would have permitted a *qui tam* action despite government knowledge when the relator was an original source to the government, it also noted that the house version would have abolished *qui tam* actions all together. Because the final compromise in the 1943 amendment retained *qui tam*

enforcement, enacted the government knowledge bar and omitted any exception for an original source, the Seventh Circuit in *Dean* concluded that Wisconsin could not maintain the *qui tam* action. It noted that any exemption should be obtained expressly from Congress. *Dean*, 729 F.2d at 1106.

In 1986, in the midst of increasing concern over fraud, Congress amended the FCA's prohibition of parasitic suits. In the 1986 version, Congress sought to overturn the federal courts' "severely restrictive interpretations." *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Importantly, the 1986 amendments fundamentally altered the underlying assumption of the 1943 law: that the *qui tam* provisions were designed to assist the government only when it did not know of the fraud. It also dispensed with the idea that, in order to be a true relator, the *qui tam* plaintiff must bring new information of the fraud to the government. The 1986 *qui tam* provisions eliminated the "government knowledge" bar, and put in its place another bar which expressly authorized relators to enforce the FCA, even in those cases where the government knows of the fraud and chooses not to pursue it, and even when the relator adds to the mix no new information on the fraud.

> [I]n passing the 1986 amendments, Congress specifically sought to diminish the government's ability "to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government." ... S. Rep. No. 345, 99th Cong., 2d Sess. 24-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-91. The 1986 amendments also reflected Congress's recognition that the government simply lacks the resources to prosecute all viable claims, even when it knows of fraudulent conduct.

*United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519 (9th Cir. 1995) (citation omitted), *vacated on other grounds*, 520 U.S. 939 (1997).

That Congress had *Marcus v. Hess* in mind when it amended the bar in 1986 is made clear by the fact that *each* of the four elements in *Hess* was made an express requirements:

> (1) The action must be "based upon" the disclosure; as occurred in *Hess* when the relator derived his knowledge from the filing of the criminal indictment.
>
> (2) The disclosure must be "public"; as occurred in *Hess* when the criminal indictment was placed in the court's open files.
>
> (3) The content of the disclosure must be of the "allegations or transactions" of the fraud or false claims; as occurred in *Hess* when the information in the indictment expressly stated the fraud.
>
> (4) The medium of the disclosure must be one of the specified fora; as occurred in *Hess* when a pleading was filed in connection with a federal investigation and criminal hearing.

That Congress had *Wisconsin v. Dean* in mind when it enacted the "original source" exception is made clear not only by the plain text – which expressly incorporates the language proposed but ultimately omitted from the 1943 amendments, as noted in *Dean* – but also by its legislative history. *See* S. Rep. No. 345, 99th Cong., 2d Sess. 12-13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, at 5277-78 (noting that Congress had been strongly urged to "rectify the unfortunate result of the *Wisconsin v. Dean* decision"). *See also United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1020

(E.D. Va. 1995) ("The legislative history of the 1986 amendments demonstrates congress's clear intent to overrule *Dean* and to make it easier for private citizens to enforce the FCA"); *United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F. Supp. 624, 630 (N.D. Ill. 1992) ("It is clear from the legislative history that Congress specifically sought to reverse the Seventh Circuit's decision in *Dean* so that suits could be brought by relators, such as the State of Wisconsin, whose independent investigation uncovered the information of fraud on the Government").

To the extent that petitioners and their *amici* claim that the original source doctrine requires relators to have direct and independent knowledge of all of the fraud prior to making any disclosures to the government, their arguments run contrary to the true the statutory purpose of §3730(e)(4). That statutory bar is intended to prohibit parasitic *qui tam* actions, and to create an exception for relators who made a meaningful contribution to the government's investigation. Encouraging relators to come forward with information of fraud is the statutory purpose of the bounty provisions, §3730(d). Reducing the bounty to relators who make small or no contribution to the discovery of the fraud is the statutory purpose of §3730(d)(1). But the only purpose of §3730(e)(4) is to bar parasitic actions.

**2. Since the Government Intervened in *Rockwell*, the Statutory Bar of Parasitic *Qui Tam* Actions Does Not Apply; and this Court Need Not Reach the Question of Original Source.**

Necessarily included in the broadly worded question presented in the petition for a writ of certiorari (whether the Tenth Circuit erred by entering judgment on in its application of the "original source" doctrine of §3730(e)(4)) is the question of whether relator Stone need satisfy the "original source"

requirement at all. In *Rockwell*, the Attorney General has intervened and is prosecuting the action on behalf of the United States. Contrary to the Tenth Circuit's opinion, once the action is brought by the government, the statutory bar of parasitic *qui tam* actions no longer applies. The judgment should therefore be affirmed on the alternative ground that the bar is inapplicable.

On equal statutory footing with the original source exception in §3730(e)(4) is the exception for actions that are "brought by the Attorney General." Clearly, when Congress amended the parasitic *qui tam* action bar, it did not intend the bar to apply when the government exercises its option to bring an action by intervention. Had Congress intended the Attorney General exception to the statutory bar of parasitic actions to apply only when the government brings the action in the first instance, and not when it intervenes, it would have expressly distinguished between §3730(a), which authorizes those direct and exclusive actions, and §3730(b)(4), which authorizes intervention. Indeed, when Congress wanted to restrict statutory bars to *qui tam* actions brought under §3730(b), it said so expressly. *See* §§3730(e)(1), (2) & (3). By referring to instances when the action "is brought by the Attorney General" rather than expressly to §3730(a), Congress created an independent exception for actions brought by the Attorney General after intervention under 3730(b)(4).

Congress chose to deal with the problem of parasitic actions when the government intervenes by limiting the amount that the relator can recover, not by depriving the court of jurisdiction to hear the entire case. In the bounty provision of §3730(d)(1), Congress created a sliding scale – permitting recovery between 0% and 10% – for a bounty paid to relators who make no meaningful contribution to the discovery of the fraud. That Congress permitted this recovery only when the government intervened, shows its intention to allow actions

based on public disclosures to go forward, even by non-original source relators, when the Attorney General takes over the case.

Application of the Attorney General exception fulfills the purpose of allowing a *qui tam* enforcement, even when the relator is parasitic, because the government itself has determined that the action is worth pursuing. No purpose would be served by preventing the government from prosecuting the action based upon the *qui tam* relator's original source status. Because the statutory bar applies to entire "actions," rather than parties, the bar restricts the jurisdiction of the court to hear the entire case, not the relator's ability to participate. Any concern over an unfair recovery by an opportunistic relator can be dealt with by limiting the amount of bounty recovered under §3730(d)(1).

Application of the attorney general exception in cases of intervention is warranted by the legislative history of the 1986 amendments. Prior to those amendments, courts interpreted the 1943 statutory bar to apply only when the government chose not to intervene in the action. For example, in *United States v. Pittman*, 151 F.2d 851, 853-54 (5th Cir. 1945), the court found it "wholly unreasonable to think that Congress intended that after the Attorney General appears and takes over for the United States the prosecution of a fraud claim because he thinks the claim a valid one, the United States should be cut off from a trial on the merits and the culprit should escape" on the basis of the statutory bar. "The intention was to discourage the carrying on of suits by undeserving relators; not to nullify the just claims of the United States when the Attorney General takes over the case in behalf of the United States." *Id.*

In the senate bill for the 1986 amendments, this holding by *Pittman* was expressly cited, where the authors made clear their belief that the jurisdictional bar does not apply in cases where the Attorney General intervenes in the *qui tam* action:

> The Senate specifically provided that jurisdiction would be barred on qui tam suits based on information in the possession of the Government unless the relator was the original source of that information. Without explanation, the resulting conference report dropped the clause regarding original sources of allegations and courts have since adopted a strict interpretation of the jurisdictional bar as precluding any qui tam suit based on information in the Government's possession, despite the source. That jurisdictional bar, however, has been applied only to private *qui tam* suits, and not those suits taken over by the Government. [*United States v. Pittman*].

S. Rep. No. 345, 99th Cong., 2d Sess. 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, at 5277.

In light of this legislative history, there can be no question that the Attorney General exception to the parasitic *qui tam* action bar applies in this case. The rule in *Pittman* was clearly established prior to the 1986 amendments, and the authors of the 1986 amendments expressly noted the rule as existing law in the Senate Report. Even the holding of *Pittman* – foreclosing operation of the bar when the Attorney General intervenes – was incorporated into the text of the 1986 amendments. Judgement should be affirmed in this case, not only because relator Stone is an original source, but because the intervention of the Attorney General moots the inquiry under §3730(e)(4), as the case qualifies for the other, independent exception to the bar of parasitic *qui tam* actions.

**3. If the Court Reaches the Question of Original Source Status, it Should Hold Direct Knowledge is Shown When the Relator Contributed to the Discovery of the Fraud by Disclosing Information to the Government Learned Through his Direct and Independent Investigatory Efforts.**

Since amendment of the statutory bar in 1986, federal courts have struggled with the question of how much information must be possessed by a relator to qualify him or her as an "original source." Most courts, reasonably enough, conclude that, to be "an" original source, a relator need not possess all of the information underlying the complaint. As explained by the D.C. Circuit:

> §3730(e)(4)(B) does not require that the *qui tam* relator possess direct and independent knowledge of *all* of the vital ingredients to a fraudulent *transaction*. ... Rare indeed would be the case in which relators could gain "original source" status, if such were the standard. *United States ex rel. Springfield Terminal Ry. Co. v Quinn*, 14 F.3d 645, 656-57 (D.C. Cir. 1994) (original emphasis)

*Amici* suggest that, in the event that the question of original source is reached in this case, the Court adopt an interpretation consistent with the statutory purpose of preventing truly parasitic *qui tam* actions. The original source exception should be interpreted to apply to any *qui tam* action when the relator made a meaningful contribution to the discovery of the fraud based upon information obtained through his own direct and independent investigatory efforts. In so holding, this Court should dispense with any requirements that the relator be an "insider" or "true whistleblower," as neither is written into the statutory bar nor consistent with its purpose.

In the Ninth Circuit, the court has adopted the view that "direct and independent knowledge" constitutes two separate requirements for original source status. A relator's knowledge is independently obtained when it is acquired prior to the disclose of allegations or transactions of fraud in one of the specified public fora. *See United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999); *United States ex rel. Hansen v. Cargill, Inc.*, 107 F.Supp.2d 1172, 1182 (N.D. Cal. 2000), *aff'd* 26 Fed. Appx. 736 (9th Cir. 2002). Knowledge is direct when the relator "discovered the information underlying his allegations of wrongdoing through his own labor." *United States ex rel. Devlin v. State of California*, 84 F.3d 358, 360 (9th Cir. 1996). Both of these requirements, as stated, are consistent with the purposes of the statutory bar. Neither requirement should be interpreted to mean that an original source must have been an "insider" who sees the entirety of the fraud "with his own eyes."

Numerous circuits hold that information obtained through a relator's own investigation leads to "direct" knowledge. In *United States ex rel. Fine v. Chevron*, 39 F.3d 957 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995) (*en banc*), the Ninth Circuit held a relator gained "direct and independent" knowledge of the information by his own labor when he reviewed audit sheets and financial records. In *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1017-18 (7th Cir. 1999), the Seventh Circuit found a Green Bay citizen who independently investigated fraud by monitoring information that was available to everyone – bus routes – to be an original source. In *Cooper ex rel. United States v. Blue Cross & Blue Shield of Florida*, 19 F.3d 562, 568 (11th Cir. 1994), the Eleventh Circuit held the relator to be an original source on the basis of a three-year investigation that included his own claims processing, research and

correspondence. In *Springfield Terminal Ry.*, 14 F.3d at 657, the D.C. Circuit found direct and independent knowledge when the relator "bridged the gap by its own efforts and experience." And in *United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F. Supp. 624, 630-31 (N.D. Ill. 1992), a relator who undertook an investigation on his own initiative was found to have "direct" knowledge.[2]

Courts which have found direct knowledge lacking under the "original source" exception often predicate their rulings on the lack of meaningful contribution by the relator to the discovery of the fraud. For example, in *United States ex rel. Devlin v. State of California*, 84 F.3d 358 (9th Cir. 1996), original source status was denied because the relators conducted only a *de minimus* investigation and based their allegations almost entirely on an admission of fraud by a third party. *See* 84 F.3d at 362 (relators "did not make a genuinely valuable contribution to the exposure of the alleged fraud"). Similarly, in *Seal 1 v. Seal A*, 255 F.3d 1154, 1163 (9th Cir. 2001), "direct knowledge" was found lacking because the relator had learned of the allegations of fraud from the government's own investigation. It was the Department of Justice attorneys who told relator about the fraud; he "played no active role in any government investigation, and [he] obtained his information ... from the government" (*id*). Similarly, in *Carghill*, 107 F.Supp.2d at 1183, Judge Breyer found that the relator had relied upon the reports of the state audit agency to formulate his allegations, merely adding legal conclusions to facts already gathered and shown in specified public fora.

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[2]The Seventh Circuit in *Lamers*, 168 F.3d at 1018, called this conclusion a "no-brainer," given *Hartigan*'s similarities to *United States ex rel. Wisconsin v. Dean*, 729 F.2d at 1104, which the 1986 Act sought to overturn.

Other instances of when the relator failed to establish original source status have occurred due to the failure of the relator's testimony. In *United States ex rel. Aflatooni v. KITSAP Physician's Services*, 163 F.3d 516, 521 (9th Cir. 1999) the court noted the relator could not recall any of the key witnesses, his claims of fraud were mere "speculation," his allegations amounted to no more than negligence, and his expert consultant provided no foundation for his conjectures. Similarly, the relator in *Alcan*, 197 F.3d at 1021, could offer no more evidence of his knowledge than his status as a member of the union.

While a relator, to qualify as an original source, must be able to provide sufficient testimony indicating direct and independent knowledge of information disclosed to the government, the Court should not broaden those requirements to frustrate the purpose of the statutory bar. In particular, the Court should not require direct knowledge on the part of the relator to mean that no information be obtained from documents or third parties. Indeed, it is impossible to conceive of any individual who could obtain knowledge of another's fraud on the government without examining information contained in documents or revealed in communications with others. Clearly, original source status exists even when information is gathered from documents and interviews. *See Springfield*, 14 F.3d at 657 (relators "bridged the gap" by reviewing documents and conducting interviews with individuals and businesses). Indeed, Barring relators who investigate their actions by reviewing documents and talking to others would surely eviscerate the FCA. "Were this the case, an actual living person would almost never be an original source, and *qui tam* actions would have to be filed by the books and ledgers themselves." *United States ex rel. Garibaldi*, 21 F.Supp.2d 607, 616 n.3.(E.D. La. 1998), *rev'd on other grounds* 244 F.3d 486 (5th Cir. 2001).

*Amici curiae* Haight and In Defense of Animals therefore urge this Court, if it reaches the definition of original source, to interpret that exception consistent with the underlying purpose of the statutory bar. Because Congress intended to bar only truly parasitic *qui tam* actions – such as the one in *Marcus v. Hess* – and also created an exception for any relator who qualifies as an original source – such as Wisconsin in *Dean* – the statutory bar should not be interpreted to require relators to be "insiders" or "true whistleblowers." To qualify as an original source, the relator must have contributed to the discovery of the fraud and to have disclosed his information without compulsion by legal process to the government, based upon knowledge obtained through his own direct and independent efforts.

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

JEREMY L. FRIEDMAN
*Counsel of Record*
2801 Sylhowe Road
Oakland, CA 94602
(510) 530-9060

KAREN L. LUGOSI
11811 North Tatum Blvd.
Suite 4020
Phoenix, AZ 85028
(602) 222-4160

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